JD(ATL)—53—05
Atlanta, GA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

IRON MOUNTAIN, INC. D/B/A
IRON MOUNTAIN RECORDS
MANAGEMENT

and **Case 10-CA-35793**

TEAMSTERS LOCAL 728

Kerstin I. Meyers, Esq.,
for the General Counsel.
James D. Fagan, Jr., Esq.,
for the Charging Party.
Richard M. Howard, Esq., and
Peter A. Schneider, Esq.
for the Respondent.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, **Administrative Law Judge**: This case was heard before me in Atlanta, Georgia, on November 18, 2005, pursuant to a complaint filed by the Regional Director for Region 10 of the National Labor Relations Board ("the Board") and is based on a charge in Case 10-CA-35793 filed by Teamsters Local 728 ("the Union") on August 5, 2005. The complaint alleges that Iron Mountain Inc., d/b/a Iron Mountain Records Management ("the Respondent" or "Iron Mountain") violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act") by failing and refusing to bargain in good faith with the Union as the exclusive representative of Respondent's bargaining unit employees. The complaint is joined by the answer filed by the Respondent wherein it denies the commission of any violations of the Act.

Upon consideration of the testimony of the witnesses, the exhibits admitted at the hearing and the admissions and stipulations entered in this case and the positions of the parties as addressed at the hearing and as set out in the parties' briefs, I make the following:

Findings of Fact and Conclusions of Law[1, 2]

I. The Business of the Respondent

The complaint alleges, Respondent admits, and I find that at all times material herein, Respondent Iron Mountain has been a Delaware corporation with offices and places of business in Atlanta, Georgia, where it has been engaged in providing business information services and retrieving business records During the past twelve month period, a representative period, Respondent, in conducting its business operations, shipped goods valued in excess of $50,000 directly to points located outside the State of Georgia and at all material times Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

II. The Labor Organization

The complaint alleges, Respondent admits and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Appropriate Unit

The complaint alleges, Respondent admits and I find the following employees of Respondent herein called the Unit constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All transportation department drivers employed by Respondent at its 4158 Boulder Ridge, 660 Distribution Drive, and 1890 McArthur Boulevard facilities, including couriers, courier assistants, shuttle drivers, service specialists and helpers, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

It is further alleged, admitted and I find that on October 10, 2003, in an election by secret ballot conducted by the Regional Director of Region 10 of the Board, a majority of the bargaining unit employees designated and selected the Union as their representative for collective bargaining with Respondent with respect to rates of pay, wages, hours of employment and other terms and conditions of employment. It is further alleged, admitted and I find that on October 20, 2003, the Board certified the Union as the exclusive bargaining representative of the Unit employees and at all times since that date the Union has been and is, the representative of a majority of the employees in the Unit for purposes of collective bargaining.

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1 General Counsel's motion for receipt of stipulation of the parties marked as Joint Exhibit 8 is received in evidence.

2 The following includes a composite of the credited testimony and the admissions, stipulations and exhibits.

IV. Alleged Unfair Labor Practices

A. Facts

The facts in this case are virtually undisputed. The Union was certified on October 20, 2003, as the exclusive bargaining representative of the bargaining unit employees. In October 2004, the Respondent implemented changes in the unit employees health insurance benefits. The Union did not receive any formal notice of these changes. The Union did not file any unfair labor practice charges against the Respondent following the changes. Subsequently on July 29, 2005, Respondent attached a memorandum to the bargaining unit employees' paychecks entitled, "Important news about your 2005 – 2006 Benefits Decisions." The memorandum announced changes to the bargaining unit employees' health benefits options for the 2005-2006 benefit year. The memorandum stated that the employees' health insurance coverage would be "discontinued" on September 30, 2005, unless they "actively select benefits this year." It also stated that "open enrollment is the only time of year when you can make changes to your benefits." No prior notice of the aforesaid changes in the employees' health insurance benefits was given to the Union. The 2005-2006 open enrollment period was staggered and the unit employees' designated enrollment period was August 2, 2005 through August 9, 2005. Open enrollment ended on August 30, 2005. The new health insurance plan become effective on October 1, 2005.

The changes between the 2004-2005 benefit plans and the 2005-2006 plans are as follows: The Health Maintenance Organization ("HMO") plan for the 2004-2005 period was discontinued and not available for the 2005-2006 plan year. All of the unit employees had selected the HMO plan for the 2004-2005 year. The 2004 HMO provided 100 percent coverage for in-network medical services and there was no annual deductible. The 2004 Preferred Provider Organization ("PPO") provided 100 percent coverage for in network, and 60 percent out of network after deductible. There was an in-network $300 individual and $600 family deductible under the 2004 PPO. There was an out-of-network $400 Individual and $800 Family deductible under the 2004 PPO option. There were two 2005 plan options. Under the 2005, 100 percent PPO there was 100 percent coverage in-network and 80 percent coverage out-of-network and an in-network $100 Individual and $200 Family deductible and an out-of-network $100 Individual and $200 family deductible. Under the 2005, 80 percent PPO plan there was 80 percent of coverage in-network and 60 percent out-of-network. Under the 80 percent PPO there was an in-network $300 Individual and $600 Family deductible, and an out-of-network $400 Individual and $800 Family deductible. The 2004 HMO required the designation of a Primary Care Physician (PCP) while all of the PPO plans did not. In addition the 2004 HMO required a PCP referral for access to a specialist while all the other plans did not require a referral. The changes in the employees cost were greater for the 2005-2006 plan than in previous years. It is undisputed that the Union filed its charge in this case on August 5, 2005. The parties subsequently did engage in bargaining but did not bargain concerning the issues of the unilateral changes to the health insurance benefits.

B. Issues

Were the changes to the health insurance benefits substantial so as to give rise to an obligation to give notice thereof and bargain with the Union? Answer: Yes

If so was the July 29, 2005, notice to the employees sufficient to meet its obligations to give notice and bargain changes with the Union? Answer: No

C. Analysis and Findings

I find the changes to the health insurance plan were significant and substantial and that the Respondent had an obligation to provide the Union with sufficient notice to enable it to bargain with the Respondent on behalf of the bargaining unit employees. It is clear from the record in this case that the Respondent failed to meet its obligation to provide adequate notice to the Union. Rather the Respondent presented the changed health insurance coverage directly to the employees as a "fait accompli" and gave them only a short enrollment period to commence to enroll in less than a week. Thus, Respondent completely by-passed the Union and presented the fait accompli to the employees. The Respondent does not deny that it only initially presented the changes to the employees on July 29, 2005. This occurred in spite of the fact that it had been engaged in contract negotiations for over a year. Yet it had not previously revealed to the Union that the changes in health insurance coverage were contemplated, much less put into a finished document which it would present directly to the unit employees on July 29, 2005. Moreover it is clear from Respondent's position at the hearing and its briefs, that this document was not presented as a proposal to bargain concerning the changes. Rather Respondent contends it had no obligation to bargain with the Union on the ground that this was a company-wide overall change in both unit and non-unit employees' health insurance coverage. It is well settled that absent impasse an employer violates Section 8(a)(5) of the Act if it makes unilateral changes to mandatory subjects of bargaining *NLRB v. Katz*, 369, U.S. 736, 743 (1946). It is also well settled as Respondent concedes that health care benefits are a mandatory subject of bargaining. *U.S. Testing Company*, 324 NLRB at 853 (1997), enfd. 160 F.3d 14 (D.C. Cir. 1998). When an employer seeks to change a condition of employment, it must notify the Union of the proposed change and give the Union sufficient notice to afford it a reasonable opportunity to bargain. *Tri Tech Services, Inc.*, 340 NLRB No. 97 (2003); If the notice is not given to the Union in sufficient time for it to request bargaining or if the employer presents it as a fait accompli as the Respondent did in this case, the Union has no obligation to request bargaining. *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3rd Cir. 1988). Although the health care plans did not come into effect until October 1, 2005, the employees were given only less than a week before the enrollment period. Respondent did not directly notify the Union of the change. This did not afford the Union a reasonable time to request bargaining. *Pontiac Osteopathic Hospital*, 333 NLRB 1021, 1023 (2001).

As noted above the Respondent defends its actions in this case as asserted in its answer to the complaint, that it had no obligation to bargain because the health insurance coverage was implemented company-wide. Initially, this premise is factually incorrect because the Respondent had at least five separate contracts with five other Teamster local unions with different health insurance provisions than those involved in the instant case. Moreover, in *Hardesty Company, Inc., d/b/a Mid-Continent Concrete*, 336 NLRB 258 (2001), enf'd. 308 F.3d 859 (8th Cir. 2002) the Board held it was "immaterial that the changes to the [health care] plan, a mandatory subject of bargaining, were company wide and as such involved both unit and non-unit employees." 336 NLRB at 259. Respondent relies on *Nabors*

Alaska Drilling, Inc., 341 NLRB No. 84 (2004) for support for the principle that corporate wide annually occurring events need not await an overall impasse in negotiations. However, as General Counsel points out in her brief the facts in the Nabor case are inapposite to the facts in the instant case before me. In Nabors the parties had agreed that the unit employees would participate in that employer's corporate-wide plan and that the employer could terminate or modify the plan without bargaining with the Union. On November 21, the employer in the Nabors case, notified the Union that the health care co-pay for employees would increase, effective January 1, 2003, and advised the union that unless it heard from the union prior to a specific date it would send out notices to the employees of the open enrollment. When the union failed to respond or demand bargaining, the employer proceeded with its proposed changes. The Board found that the Union had waived its right to bargain by its failure to timely request bargaining over the proposed changes after the employer provided notice. In the instant case before me the Union had no obligation to request bargaining as the change was announced as a fait accompli.

Conclusions of Law

1. The Respondent is an employer within the meaning of Sections 2(6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes in the bargaining unit employees' health insurance plans.

4. The above unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent violated the Act it shall be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act including the posting of an appropriate notice.

Respondent shall be ordered to rescind the unilateral changes to the bargaining unit employees' health insurance plans and restore the status quo ante prior to the unlawful unilateral changes. Respondent shall also be ordered to make whole any employees who may have suffered the loss of monies and or benefits because of the unfair labor practices as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971) with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[3]

ORDER

The Respondent, Iron Mountain Inc., d/b/a Iron Mountain Records Management its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Unilaterally implementing changes in the bargaining unit employees terms and conditions of employment by implementing changes in their health insurance plans.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Bargain with the Union as the exclusive representative of the employees in the following appropriate unit:

> All transportation department drivers employed by Respondent at its 4158 Boulder Ridge, 660 Distribution Drive, and 1890 McArthur Boulevard facilities, including couriers, courier assistants, shuttle drivers, service specialists and helpers, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

(b) Rescind any unilateral changes in the employees' health insurance plans and restore the status quo ante.

(c) Make whole the unit employees for any loss of monies or benefits they may have incurred as a result of the unlawful unilateral changes made to their health insurance plans, with interest.

(d) Preserve and, within 14 days of a request, provide at the office designated by the National Labor Relations Board or its agents, one copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

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3 If no exceptions are filed as provided by § 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its facility in Atlanta, Georgia, copies of the attached notice marked "Appendix[4]." Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C.

Lawrence W. Cullen
Administrative Law Judge

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "posted by order of the National Labor Relations Board" shall read "posted pursuant to a judgment of the United States Court of Appeals enforcing an order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT implement unilateral changes in the health insurance plans of our bargaining unit employees without having provided notice to and bargained to agreement or impasse with the Teamsters Local 728 as the exclusive collective bargaining representative of the employees in the following appropriate unit:

All transportation department drivers employed by Respondent at its 4158 Boulder Ridge, 660 Distribution Drive, and 1890 McArthur Boulevard facilities, including couriers, courier assistants, shuttle drivers, service specialists and helpers, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unlawful changes in your health insurance plans and will restore the status quo ante before the unlawful unilateral changes.

WE WILL make whole any bargaining unit employees who have incurred a loss of monies or benefits as a result of the unlawful unilateral changes, with interest.

IRON MOUNTAIN, INC.D/B/A
IRON MOUNTAIN RECORDS MANAGEMENT
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

233 Peachtree Street NE, Harris Tower, Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8 a.m. To 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (404) 331-2877